



## **DEPARTMENT OF LABOR**

### **Occupational Safety and Health Administration**

**[Docket Nos. OSHA-2014-0025, 0026, OSHA-2015-0004, 0007, 0011, 0016, 0023]**

#### **Authorization to Open Dockets of Denied Variance Applications for Public Access**

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice.

**SUMMARY:** In this notice, OSHA announces its intent to update the publication of the dockets of variance applications that it denied in the period from 2014 to 2015.

Previously OSHA published a Federal Register notice announcing the denied variance application dockets for the 2010 to 2014 (79 FR 76387) period. OSHA is making this information available to the public to enhance transparency concerning the variance process, to assist the public in understanding the variance process, and to reduce errors in applying for future variances.

**FOR FURTHER INFORMATION CONTACT:** Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-3647, Washington, DC 20210; telephone: (202) 693-1999; email: [Meilinger.francis2@dol.gov](mailto:Meilinger.francis2@dol.gov).

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S.

Department of Labor, 200 Constitution Avenue, NW, Room N-3655, Washington, DC 20210; phone: (202) 693-2110 or email: [robinson.kevin@dol.gov](mailto:robinson.kevin@dol.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The principal objective of the Occupational Safety and Health Act of 1970 (“the OSH Act”) is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources” (29 U.S.C. 651 *et seq.*). In fulfilling this objective, the OSH Act authorizes the implementation of “such rules and regulations as [the Assistant Secretary of Labor for Occupational Safety and Health] may deem necessary to carry out [his/her] responsibilities under this Act” (29 U.S.C. 657(g)(2)).

Under several provisions of the OSH Act, employers may apply for four different types of variances from the requirements of OSHA standards. Employers submit variance applications voluntarily to OSHA, and the applications specify alternative means of complying with the requirements of OSHA standards. The four types of variances are temporary, experimental, permanent, and national-defense variances. OSHA promulgated rules implementing these statutory provisions in 29 CFR part 1905 (“Rules of Practice for Variances, Limitations, Variations, Tolerances, and Exemptions under the William-Steiger Occupational Safety and Health Act of 1970”). The following paragraphs further describe each of these four types of variances.

Temporary variance.<sup>1</sup> This variance delays the date on which an employer must comply with requirements of a newly issued OSHA standard. The employer must submit the variance application to OSHA after OSHA issues the standard, but prior to the effective date of the standard. In the variance application, the employer must demonstrate an inability to comply with the standard by its effective date “because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date.” Employers also must establish that they are “taking all available steps to safeguard [their] employees against the hazards covered by the standard,” and that they have “an effective program for coming into compliance with the standard as quickly as practicable.” (29 U.S.C. 655(b)(6)(A)).

Experimental variance.<sup>2</sup> OSHA may grant this variance as an alternative to complying with the requirements of a standard whenever it determines that the variance “is necessary to permit an employer to participate in an experiment . . . designed to demonstrate or validate new and improved techniques to protect the health or safety of employees.” (29 U.S.C. 655(b)(6)(C)).

Permanent variance.<sup>3</sup> This variance authorizes employers (or groups of employers) to use alternative means of complying with the requirements of OSHA standards when the

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<sup>1</sup>See Section 6(b)(6)(A) of the OSH Act (29 U.S.C. 655) and 29 CFR 1905.10

<sup>2</sup>See Section 6(b)(6)(C) of the OSH Act (29 U.S.C. 655)

<sup>3</sup>See Section 6(d) of the OSH Act (29 U.S.C. 655) and 29 CFR 1905.11

employers demonstrate, with a preponderance of evidence, that the proposed alternative protects employees at least as effectively as the requirements of the standards.

National defense variance.<sup>4</sup> Under this variance, OSHA, “may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, or exceptions to and from” the requirements of its standards that it “find[s] are necessary and proper to avoid serious impairment of the national defense” (29 U.S.C. 665). Such variances can be in effect no longer than six months without notifying the affected employees and affording them an opportunity for a hearing.

Additionally, OSHA developed optional standardized variance application forms, and obtained the required Office of Management and Budget (OMB) approval for the information collection requirement (OMB control no. 1218-0265 / Expires 6/30/2018), in order to assist employers in meeting the paperwork requirements contained in these regulations. Further, in order to facilitate and simplify the completion of the complex variance applications and reduce the information collection burden on applicants, OSHA made the variance application forms and accompanying completion instructions, as well as variance application checklists, accessible from its “How to Apply for a Variance” webpage (<http://www.osha.gov/dts/otpc/variances/index.html>).

## **II. Denied Variance Applications**

Generally, when receiving a variance application, OSHA conducts an administrative and technical review, which includes verifying an applicant completed the application

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<sup>4</sup>See Section 16 of the OSH Act (29 U.S.C. 665) and 29 CFR 1905.12

fully and included required information and evaluating the effectiveness of the alternate safety measures proposed by the applicant. Part of OSHA's administrative variance application evaluation is to establish a docket for each case. OSHA then places the variance application and other related materials submitted by the applicant in the docket without revision. Initially, these materials are not made public.

Upon completion of the technical review, if OSHA determines to move forward with the grant of a variance, it develops and publishes a preliminary Federal Register notice (FRN) announcing the variance application, grant of an interim order (when such was requested by the applicant), and request for public comment. When the preliminary FRN is published, OSHA makes the case docket public and available online at the Federal eRulemaking Portal (<http://www.regulations.gov>).

Following publication of the preliminary FRN, interested parties may submit their comments and attachments electronically to the Federal eRulemaking Portal. OSHA monitors public comments received (if any), and at the expiration of the comment period reviews and analyzes them. Based on the review results, OSHA develops and publishes the final FRN granting or denying the variance.

If OSHA determines not to move forward with the grant of a variance, it does not publish the variance docket. A variance application may be denied for a variety of reasons upon completion of the technical review. Often these reasons stem from errors employers commit in completing their applications. Reviewing the variance application forms' completion instructions, the application checklists, and previously denied variance applications prior to completing a variance application will assist applicants in

determining whether their applications are complete and appropriate, as well as to avoid common errors. The following are examples of common errors that lead to the denial of applications:

**Denied – unresolved citation.** An employer cannot use a variance application to avoid or resolve an existing citation while contesting the citation. If OSHA has issued a citation on the standard (or provision of the standard) for which an employer is seeking a variance, OSHA may deny the application or place it on hold until the parties resolve the citation (29 CFR 1905.5). Therefore, in order to avoid this type of error, a variance application **should not contain** a request for resolving a contested citation.

**Denied – exemption requested.** An application for a variance is a request proposing use of alternate means for protecting workers that are at least as effective as the standards from which the applicant is seeking the variance. Therefore, in order to avoid this type of error, a variance application **should not contain** a request for an outright exemption or waiver that permits the applicant to avoid complying with the requirements of an applicable standard. Only national-defense variances may provide outright exemptions from OSHA standards (29 CFR 1905.12).

**Denied – not as protective as standard.** The technical review of the variance application found that it failed to demonstrate by a preponderance of evidence that the proposed alternate means of compliance protects workers at least as effectively as the protection afforded by the standard from which the applicant is seeking the variance (29 CFR 1905.11). Therefore, in order to avoid this type of error, a variance application

**should contain** proposed alternate safety measures that are at least as effective as the protection afforded by the applicable standard.

**Denied – standard or interpretation already exists.** The applicant proposes use of alternate means that OSHA previously determined acceptable for use by issuing a letter of interpretation (LOI). Since use of the proposed alternate was allowed prior to the filing of the variance application, the application is unnecessary. The applicant may use the means of compliance in the manner determined acceptable and described by the LOI.

**Denied – site located solely in State-Plan state.**<sup>5</sup> When obtaining a variance for establishment(s) located solely in states that operate their own OSHA-approved occupational safety and health plans, employer(s) must follow the variance-application procedures specified by the State Plan(s) covering states in which they have establishment(s) named in the variance application(s) (29 CFR 1952). Therefore, in order to avoid this type of error, a variance application for establishment(s) located solely in State Plan states **should be filed** in the state(s) where the establishments are located.

**Denied – application missing side-by-side comparison.** When obtaining a multi-state variance (involving at least one location in a state under Federal OSHA authority and one location in a state under State Plan authority) and the application does not contain side-by-side comparison of federal and state plan standard(s), the application will be denied. Therefore, in order to avoid this type of error, the application for a multi-state variance should contain a side-by-side comparison of the federal standard from which the

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<sup>5</sup>Section 18 of the OSH Act of 1970 encourages States to develop and operate their own job safety and health programs.

employer is requesting a variance with the corresponding state standard. The corresponding state standard must be essentially identical in substance to the federal standard.

**Denied – application inappropriately requests product or product design approval.** The variable working conditions at jobsites and the possible alteration or misapplication of an otherwise safe piece of equipment could easily create hazardous conditions beyond the control of the equipment manufacturer. Therefore, it is OSHA’s policy not to approve or endorse products or product designs.<sup>6</sup> In order to avoid this type of error, a variance application **should not contain** a request for product or product design approval.

**Denied – application inappropriately addresses proposed standard.** The applicant is seeking a variance from a proposed standard that has not been published as a final rule and is subject to possible alteration and revision. A variance is an alternate means of compliance that is different from the means of compliance required by a specific (in effect) OSHA standard (29 CFR 1905.11). Therefore, in order to avoid this type of error, a variance application **should not contain** a request for a variance from a proposed standard that has not been published as a final rule.

**Denied – application inappropriately addresses a “performance” standard or “definition” in a standard.** The variance application did not propose use of alternate

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<sup>6</sup>See LOI dated December 30, 1983 @ [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=19170](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=19170).



means of compliance from a standard that describes a specific method for meeting its safety requirements. Instead, the applicant is requesting a variance from a “performance standard,” “definition,” “scope,” “applicability” or “purpose” portion(s) of a standard that leaves “open ended” or “unspecified” the means and methods for meeting its safety requirements (29 CFR 1905.11). Therefore, in order to avoid this type of error, a variance application **should not contain** a request for a variance from a performance standard or definition in a standard.

**Denied – application inappropriately requests a temporary variance filed after the standard’s effective date.** As stated earlier in this SOP, a temporary variance is an alternative means of implementing a new standard during a specified period of time that it will take the employer to come into compliance with the new standard. Employers must request a temporary variance prior to the effective date of the new standard (Section 6(b)(6)(A) of the OSH Act and 29 CFR 1905.10). However, the applicant incorrectly submitted a request for a temporary variance after the effective date of the standard.

**Denied – application inappropriately requests a variance from the General Duty clause (Section 5(a)(1) of the OSH Act).** OSHA does not have authority to grant variances from Section 5(a)(1) of the Act. Section 5(a)(1) is not a specific occupational safety and health standard, but a statutory provision of the Occupational Safety and Health Act (OSH Act). This section states that “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employee.” Experience indicates that generally an applicant seeks a Section 5(a)(1)

variance as a result of receiving a General Duty clause citation. A citation issued under Section 5(a)(1) constitutes a serious violation that must be abated in such a manner as to provide a safe and healthful workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.

**Denied – application inappropriately requests a variance from a consensus standard.** A variance from a consensus standard (developed by industry or other standards development organization (SDO)) is inappropriate and cannot be granted because variances only apply to specific occupational safety and health standards or regulations promulgated by OSHA. Consensus standards developed by industry or other standard development organizations are not specific occupational safety and health standards promulgated by OSHA.

**Withdrawn** – During the administrative and technical evaluations, OSHA will evaluate a variance application for appropriateness, completeness, and effectiveness. When an application fails to pass the administrative review, OSHA will inform the applicant regarding the application's defect(s). At that point, an applicant may choose to amend its application to fix its defect(s) or withdraw its application without prejudice. For example, an applicant may withdraw its application when it determines that: a variance is no longer necessary; its application is incomplete and the applicant chooses to stop pursuing the matter; or the applicant's work place is located solely in a state operating an OSHA-approved State Plan so that the application should have been submitted to the State Plan.

## **II. Denial of Multi-State Variance Applications**

Under the provisions of Section 18 of the OSH Act of 1970 and 29 CFR 1952, states can develop and operate their own job safety and health programs. OSHA approves and monitors State Plans and provides up to 50 percent of an approved plans' operating costs. Currently, there are 22 states and territories operating complete State Plans (covering both the private sector and State and local government employees) and six states covering state and local government employees only. States with OSHA-approved State Plans may have additional requirements for variances.

For more information on these requirements, as well as State Plan addresses, visit OSHA's State Plans webpage: (<http://www.osha.gov/dcsp/osp/index.html>).

Employers filing a variance application for multiple workplaces located in one or more states under Federal OSHA authority may submit their applications to Federal OSHA by meeting the requirements set forth in the OSH Act and the implementing regulations (29 CFR 1905). Employers filing a variance application for multiple workplaces located in one or more states exclusively under State Plan authority must submit their applications in that particular state or states. Note that State Plans vary in their applicability to public sector and private sector places of employment. For example, Virginia's plan does not cover private-sector maritime employers, while California's plan covers most private-sector maritime employer activities, except as specified by 29 CFR 1952.172. Employers should follow the variance-application procedures specified by the State Plan(s) for states in which they have an establishment named in the variance application.

Applicants with workplaces in one or more states under State Plan authority and at least one state under Federal OSHA authority may apply to Federal OSHA for a variance by meeting the requirements set forth in the OSH Act and the implementing regulations (29 CFR 1905 and 1952). When applicants perform work in a number of states that operate OSHA-approved safety and health programs, such states (and territories) have primary enforcement responsibility over the work performed within their borders. Under the provisions of 29 CFR 1952.9 ("Variance affecting multi-state employers") and 29 CFR 1905.14(b)(3) ("Actions on applications"), a permanent variance or interim order granted, denied, modified, or revoked by the Agency becomes effective in State Plans as an authoritative interpretation of the applicants' compliance obligation when: (1) the variance request involves the same material facts for the places of employment; (2) the relevant state standards are the same as the Federal OSHA standards from which the applicants are seeking the variance; and (3) the State Plan does not object to the terms of the variance application.

### **III. Granting Public Access to Dockets of Denied Variance Applications**

OSHA has denied a large number of variance applications since its inception in the early 1970s. As previously indicated in this notice, because OSHA denied these applications, initially they were not published in the Federal Register for public review.<sup>7</sup>

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<sup>7</sup>Sections 6(b), 6(d), and 16 of the OSH Act and 29 CFR 1905 set out the laws and regulations applicable to Variances. Whereas, these provisions require OSHA to announce variance applications and grants by publication in the Federal Register, no such provisions are in place for denied variance applications.

However, in 2010, OSHA made public a sizable number of illustrative variance applications (approximately 200) that it denied during the period from 1995 through 2010.

Further, on December 22, 2014, OSHA published an FRN announcing the dockets of the variances that it denied from 2010 through 2014 (79 FR 76387). The dockets for these denied or withdrawn variance applications are accessible online at the Federal eRulemaking Portal (<http://www.regulations.gov>), as well as on OSHA’s “Denied and Withdrawn Variance Applications for 1995-2014” webpage: ([http://www.osha.gov/dts/otpca/variances/denied\\_withdrawn95-10.html](http://www.osha.gov/dts/otpca/variances/denied_withdrawn95-10.html)).

OSHA made this information available to the public to enhance transparency concerning the variance process, to assist the public in understanding the variance process, and to reduce errors in applying for future variances.

This action was consistent with the policy established by the Open Government Directive, M-10-06, issued by the Office of Management and Budget on December 8, 2009 ([http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf)).

OSHA published the dockets of the variance applications that the Agency denied during 2014-2015<sup>8</sup> on the Federal eRulemaking Portal and OSHA’s “Denied and Withdrawn Variance Applications for 1995-2015” webpage. These denied variance application dockets are presented in the table below:

Docket ID	Company Name	Standard from Which Variance	Date of Denial or	State(s)	Reason Denied or
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<sup>8</sup>Completed between the governmental fiscal years of October 1, 2010 and September 30, 2014

		Requested	Withdrawal		Withdrawn
OSHA-2015-0016	J. W. Fowler, Co.	1926.803	12/4/2015	ND	Withdrawn--variance not necessary
OSHA-2015-0023	Wahlco – D. W. Tool	General-duty clause Section 5(a)(1) of the Act	10/5/2015	MO	Denied – No variances from the general-duty clause
OSHA-2015-0011	Rosenwach Tank Co. LLC	1926.501(b)(1)	06/04/2015	NY	Denied – Not as protective as standard
OSHA-2015-0007	Avantor Performance Materials, Inc.	1910.1200; Appendix C, (C.2.3.1)	04/14/2015	PA, NJ, KY	Denied – Not as protective as standard
OSHA-2015-0004	Devin Kieschnick (DK) Farms	1910.142(b)(2)	03/10/2015	TX	Denied – Not as protective as standard and exemption requested
OSHA-2014-0026	Transfield Services	1910.134	12/15/2014	TX, CA	Withdrawn – variance not necessary
OSHA-2014-0025	Union Pacific Railroad (UPRR)	1910.110(b)(6) (ii)	10/8/2014	IL	Denied – not as protective as standard and exemption requested

### **Authority and Signature**

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 655, Secretary of Labor’s Order No. 1-2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR part 1905.

Signed at Washington, DC, on March 7, 2016.

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**David Michaels,**  
Assistant Secretary of Labor for Occupational Safety and Health.

**BILLING CODE: 4510-26-P**

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